Rish Equipment Company, Inc. *and* **International Union of Operating Engineers, Local No. 37, AFL-CIO.** Cases 5-CA-11895, 5-CA-11998, and 5-RC-11086

August 17, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

On March 5, 1981, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Rish Equipment Company, Inc., Frostburg, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

We have modified the Administrative Law Judge's notice to conform with his recommended Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT discourage membership in International Union of Operating Engineers, Local No. 37, AFL-CIO, or any other labor organization, by discharging, terminating, or otherwise discriminating against employees because of their union membership or activities.

WE WILL NOT coercively interrogate employees concerning their union membership or activities, or such activities on the part of other employees.

WE WILL NOT create an impression of surveillance of employees' activities.

WE WILL NOT threaten employees with discharge and other recriminations for engaging in union activities.

WE WILL NOT promise employees benefits and improvements in their working conditions if the employees would reject the abovenamed Union and cease engaging in activities on its behalf.

WE WILL NOT instruct employees how to vote in a National Labor Relations Board election.

WE WILL NOT instruct employees not to cooperate in investigations by agents of the National Labor Relations Board.

WE WILL NOT threaten employees with shutting down our operations if it were necessary in order to keep the employees from being represented by a labor organization.

WE WILL NOT threaten employees with extended litigation in order to discourage their membership in and activities on behalf of a labor organization.

WE WILL NOT state to employees that it would be futile for them to select the abovenamed Union, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer David S. Ake, Michael R. Morris, Michael Aldridge, Richard Aldridge, and John F. Palmer, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered by reason of our discrimination against them, with interest.

RISH EQUIPMENT COMPANY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This consolidated proceeding was heard before me in Frostburg, Maryland, on August 14–15, 1980, upon due notice. The several complaints, as amended, allege violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein the Act), based on charges duly filed against Rish Equipment Company, Inc. (herein the Company or Respondent), by International Union of Operating Engineers, Local No. 37, AFL-CIO (herein the Union), on February 5, 1980 (in Case 5-CA-11895), and on March 6, 1980 (in Case 5-CA-11998).

By order dated May 16, 1980, the Regional Director for Region 5 of the National Labor Relations Board (herein the Board) ruled that Case 5-RC-11086 be consolidated with the aforesaid complaint cases for the purpose of a hearing and ruling on the challenges to the ballots of some nine employees whose ballots were challenged in an election held in that case by the Board on February 15,1980.

At the conclusion of the hearing, oral argument was waived. However, within the time allowed helpful posthearing briefs were filed with me by counsel for all parties, which have been duly considered. Upon the pleadings, stipulations, and arguments of counsel, the evidence, including my observation of the demeanor of the witnesses,[1] and the entire record, I make the following:

FINDINGS AND CONCLUSIONS[2]

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a corporation engaged in the sale and service of heavy construction and earth-moving equipment with its headquarters in Bluefield, West Virginia. It has sales and maintenance branches in several States of the United States; the branch located at Frostburg, Maryland, is the only one involved in this proceeding. The Frostburg facility had been in existence for several years prior to the events giving rise to the instant proceeding, which occurred near the end of calendar year 1979 and the commencement of calendar year 1980. At that time, there were approximately 14 employees at the Frosturg facility, which was divided into the service department, parts department, and office. As described by Kermit Clower, the general manager of the Frostburg facility, "The service department services the equipment that we sell to the customers. The parts department sells across the counter and in the field to our customers." The office force includes General Manager Clower, a couple of salesmen, and a few office clerical employees who handle the paperwork involved with respect to the activities of the other two departments. Prior to December 1979, none of the employees at the Frostburg branch had ever been represented for purposes of collective bargaining by a labor organization; however, the record discloses that the parts and service employees at one or more of the Company's other branches are represented for collective-bargaining purposes by a labor organization.

In December 1979, an organizational drive commenced among the employees at the Frostburg branch. This resulted in the filing of a petition by the Union on January 10, 1980, and thereafter an election was conducted (pursuant to a Stipulation for Certification Upon Consent Election) on February 15, 1980. However, the results of the election were inconclusive because of a large number of challenged ballots. Several of the challenged ballots involved employees who are the subject of the instant complaint; others involved the issue of unit placement, as discussed more fully *infra*.

It is the position of counsel for the General Counsel and of counsel for the Union that Respondent reacted with great antipathy and opposition to the union campaign, and subsequently terminated four employees because of their participation in such campaign. Respondent denies that it committed any unfair labor practices, claiming that it discharged one of the employees for cause, and that the others were terminated because of depressing economic conditions. We now turn to the evidence adduced in support of these positions.

B. *The Commencement of the Union Campaign; Alleged Interference, Restraint, and Coercion; and the Discharge of David (Sam) Ake*

As previously noted, the union campaign commenced at the Frostburg branch in December 1979; the instigator was Sam Ake, a parts clerk in the parts department. It appears that from time to time Ake, in the course of his duties, traveled to some of the other company branches where the Company bargains with a labor union as the representative of some of its employees. Ake testified that he talked to the employees at some of the other branches concerning their salaries and benefits, and discussed these matters with employees at the Frostburg

[1] Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[2] There is no issue as to the jurisdiction of the Board or the status of the Union as a labor organization within the meaning of the Act. The complaint alleges sufficient facts respecting the interstate operations of Respondent upon which I may, and do hereby, find that Respondent is, and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The complaint alleges, the answer admits, and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Sec. 2(5) of the Act.

branch when he returned. Some of these discussions actually took place on the premises of Frostburg branch. Ake first contacted a representative of the Union in late November and planned a meeting for December 14. However, that date conflicted with the time of the Company's Christmas party; accordingly, the union meeting was postponed until on or about January 8, 1980.

One of the employees with whom Ake discussed the Union was John Palmer, a service department employee.[3] Palmer, who impressed me as a very honest and candid witness, testified that he first heard about the Union in a discussion with Ake around the first of December; that Ake later told him about the planned union meeting for December 14, which had to be delayed because of the Company's Christmas party; and that, shortly prior to the Christmas party, Clower approached him in the service department area and asked whether Palmer knew of anyone who had been discussing a union. Palmer feigned ignorance, telling Clower he was unaware of any such discussion. Later in December, after the Christmas party, Clower again approached Palmer in the service department and asked whether the latter had heard any talk about the Union. On this occasion, Clower asked specifically whether Ake had said anything to Palmer on that subject because, as Palmer testified, Clower had a "feeling" that Ake had "some idea about a union." Clower also advised Palmer that, "as a Christian and as a brother," Palmer owed Clower the obligation to tell the truth. However, Palmer again pretended ignorance and confusion, and advised Clower that he did not know what was going on.[4]

Clower generally denied interrogating employees about their own union activities or those of any fellow employees. However, his testimony was fraught with self-contradictions and contradictions of the testimony of other witnesses for Respondent and with evasiveness and avoidance of direct answers to questions of counsel, and he generally impressed me as one who would subvert his oath to the interest of his employer. Accordingly, I generally discredit his testimony when it is in conflict with that of other witnesses. I therefore find the aforesaid interrogations by Clower of Palmer, which occurred without provocation on the part of Palmer and without assurance by Clower that there would be no recrimination, to constitute interference with and restraint and coercion of employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

On Thursday, January 3, 1980, the day before Ake's termination, Clower again approached Palmer in the service department and asked, "What are you guys trying to do to me here?" When Palmer asked what Clower meant, the latter responded, "Well, I guess you're not in on it then . . . but I think they're trying to get a union started and I believe Sam Ake is the one behind it all and I am going to find out if he is." Palmer again feigned ignorance as to the subject matter, and told Clower that he had no information concerning it.

The following day, January 4, Clower approached Palmer in the service department, in the presence of Service Manager Norval Wood, and said, "Well, John, I found out Sam Ake is behind all of this and before the day is over don't be surprised if you see more than one change around here." Palmer did not respond.[5]

I find the foregoing statements of Clower to constitute an impression of surveillance of employees' union activities, as well as a threat of recrimination for engaging in such activities, all in violation of Section 8(a)(1) of the Act.

On January 4, 1980, at the end of the workday (approximately 4 p.m.), Ake was called into Clower's office and was then and there terminated. Clower reminded Ake that he was still in the probationary period,[6] which meant that, if the Company was dissatisfied with his work, it could release him, or that, if he was dissatisfied with the benefits, he could leave on his own. Clower went on to cite several customer complaints about Ake's work (without naming the customers), and opined that the complaints were probably a consequence of Ake's accent. Clower also stated that he believed Ake would be happier if he returned to his former job, which was working with retarded or disabled children.

Neither Clower nor Respondent disputes Ake's testimony that he was told at the exit interview that the reason for his termination was customer complaints, and that the reason for the timing of the discharge was because it was "immediately before the end of the employee's probationary period."[7] However, contrary to Respondent, I find that the evidence does not support these contentions, but rather that substantial evidence supports the burden of the General Counsel on this issue.

In the first place, there is no substantial evidence to sustain Respondent's contention that Ake was an unsatisfactory employee based upon customer complaints or otherwise. Ake denied that he had ever received complaints about his work and credibly testified that, to the contrary, Clower had commended his work shortly before the termination. This testimony is corroborated by that of Michael Morris, an employee who worked with Ake in the parts department. Morris testified that he had been unaware of any customer complaints about Ake's work, and that after the Christmas party in December 1979 Morris was present when Clower told Charles Hott, parts department supervisor, that Clower would like Hott to give Ake a glass calendar because the latter was doing a fine job.[8]

Clower sought to bolster his testimony concerning customer complaints and other asserted derelictions by

[3] Palmer had originally been hired by the Company on October 2, 1979, as a bookkeeper. However, shortly after Thanksgiving of that year, Clower transferred him to the service department because he was not "working out as a bookkeeper." Clower had decided to keep him with the Company if Palmer "would like to work somewhere else." The parties stipulated that Palmer worked in the service department from December 6, 1979, until January 4, 1980, performing mechanical-type work in that department.

[4] Palmer testified as to one more instance of similar interrogation by Clower in the service department in December.

[5] Based on the credited testimony of Palmer. Norval Wood was not called as a witness at the hearing although it was not shown that he was unavailable.

[6] The probationary period was 180 days from the time of employment, which was, in Ake's case, from July 10, 1979.

[7] Resp. br. at 6.

[8] Hott was not called as a witness at the hearing, and it was not shown that he was unavailable.

Ake with handwritten notations. However, these are unpersuasive for a number of reasons: (1) they were not presented to Ake prior to the termination; (2) most of them refer to statements or reports by Hott respecting Ake's conduct and lack persuasiveness because of the failure to call Hott as a witness; and (3) one of the asserted customer complaints was inserted by Clower on March 29, 1980, several months after the discharge. There can be no reason for this conduct except that it was an attempt to bolster Respondent's defense in this case.

Moreover, I note Clower's failure to offer Ake an opportunity to work in another department of the facility where he might not have as much contact with customers as in the parts department. This is in sharp contrast to Clower's actions with respect to Palmer, prior to the union campaign, where he offered Palmer an oportunity to work in another department when Palmer was not satisfactorily performing bookkeeping work.

Finally, I note that the termination took place immediately after Clower apparently learned of Ake's preeminence in the union campaign to which Clower was unalterably opposed. Indeed, the previous day employees received a slip from management stating that employees with less than 1 year's service should speak to their managers for the purpose of discussing the timing and length of their vacation in 1980. Ake testified without contradiction that he talked with Hott and asked him if July was all right, and that Hott responded that he did not see any conflict and thought it would work out fine.[9] Thus, on the day before the termination, Hott was unaware of any intention to discipline or terminate Ake for any customer complaints or other alleged derelictions engaged in by Ake.

Accordingly, based on all of the foregoing, I find that the termination of Ake on January 4, 1980, was in retaliation for his union activities, which Respondent vigorously opposed. Such discharge was therefore discrimination in order to discourage membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

C. *Additional Interference, Restraint, and Coercion*

As previously noted, on January 10, 1980, the Union filed a petition for an election at Respondent's Frostburg branch (Case 5-RC-11086). The election was eventually held on February 15, 1980, pursuant to a Stipulation for Certification Upon Consent Election agreed to by the parties and approved by the Regional Director on February 14, 1980.[10] During January and February, Clower had several conversations and meetings with employees concerning the Union in which he made several remarks which the General Counsel contends constitute interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act. We come now to an examination of that evidence.

1. As previously set forth, on January 3, 1980, Clower advised service department employee Palmer that he thought that employees were "trying to get a union started," that he believed that fellow employee Ake was the instigator, and that he intended to find out if such was the fact. Such statement certainly indicated management's concern respecting the legitimate union activities of its employees and its power to uncover the leader of such activities. In the context of Respondent's great antipathy toward the union activities of its employees, such statement constitutes an implied threat respecting the employees' engagement in such activities in violation of Section 8(a)(1) of the Act.

2. As previously set forth, I have found that on January 4 Clower advised service department employee Palmer that he had found out that Ake was behind the Union and told Palmer not to be "surprised if you see more than one change around here before the day is over." Such statement clearly indicated management's power to ascertain the nature and extent of an employee's union activities plus a threat to retaliate against employees for engaging in such conduct. It thus clearly constitutes a threat in violation of Section 8(a)(1) of the Act.

3. On Saturday, January 5, 1980, the day following Ake's discharge, Clower called fellow parts department employee Morris into his office and began explaining to Morris the latter's pay scale (which included Veteran Administration benefits). During the course of the conversation, Clower stated that the reason for making such explanation to Morris was because Clower did not intend to "have any interference with this Company as long as I'm living. Do you know what I mean?" Morris responded, "Yes sir," and that ended the conversation. In the context of Respondent's antiunion conduct, which included the discriminatory discharge of Morris' fellow employee the day before, it is a reasonable inference that Clower's remark referred to the employees' union activities, and that Clower would brook no such activities as would interfere with the unfettered conduct of such business operation; as such, it constituted a threat of retaliation for engaging in activities protected by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. On January 18, 1980, Respondent held an awards banquet for its employees at its Bluefield, West Virginia, headquarters. Ronald Durst, a salesman at the Frostburg branch, accompanied Clower to Bluefield in the latter's automobile. During the trip, Clower asked Durst whether he had heard anything about the union organizing at the Frostburg branch, and Durst replied that he had overheard some men talking about it before Christmas but he had not mentioned it to Clower because he did not think it was important. Clower asked if Durst felt that Ake was involved, to which Durst replied that Ake had, in fact, approached him about the Union, but that was as much as Durst knew about it. After the banquet, as the two men rode back to the motel, Clower requested that, if Durst learned anything more, to please let Clower know. Durst responded that he had told Clower

[9] Morris also testified that on January 3 he discussed his vacation time with Hott in the same manner.

[10] The appropriate collective-bargaining unit set forth in the stipulation is as follows:

> All employees employed by the Employer at its Frostburg, Maryland, location, excluding all office clerical employees, guards and supervisors as defined in the Act.

everything he knew, to which Clower replied, "Well, Ronnie, I just want to tell you something. If you're not telling me the truth or if I find out you're doing anything else I'll fire you if you sold $10 million worth of equipment; I don't care."[11] I find the foregoing interrogation and threat concerning employees' union activities to constitute interference, restraint, and coercion of employees in the exercise of their section 7 rights in violation of Section 8(a)(1) of the Act.

5. On or about January 21, 1980, Durst was called into Clower's office. Present, in addition to Clower, was a man initially referred to by Durst as a Mr. Gardner, a labor consultant for Respondent. However, the record reflects that Durst apparently misunderstood the consultant's name and that the person's correct name was Crickinburger. Crickinburger proceeded to interrogate Durst concerning what the latter knew about the union activities at the Frostburg branch. Durst responded that he had already told Clower all he knew about it, but Crickinburger insisted that Durst repeat what Durst had told Clower; whereupon, Durst repeated the incident before Christmas where Durst had overheard Ake talking about the Union. Durst also mentioned the name of the other employee with Ake at the time, who was Morris. Crickinburger further interrogated Durst as to his own union activities, to which Durst responded that he had belonged to the Operating Engineers Union since 1974, and that Clower was aware of that. Crickinburger advised Durst that the Company considered him to be a part of management and that, if the Company found out that Durst was involved in the employees' union activities in any way other than he had told Clower and Crickinburger, Durst would be fired.[12] I find, based on all of the foregoing, that: (1) Durst was an employee and not an official or agent of Respondent; and (2) the interrogation of and threat to Durst by Crickinburger constituted interference, restraint, and coercion of employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

6. During the week commencing January 21, 1980, Clower had several meetings with employees in the appropriate unit in their breakroom. At the first meeting, which occurred on or about January 21, Clower was accompanied by Respondent's labor consultant from Roanoke, Virginia. This was the first meeting which Clower had with unit employees following the Union's petition for an election. Clower had a piece of paper from the Union which was apparently a letter to the Company requesting recognition and bargaining. Clower said that the Union wanted to negotiate a contract behind the backs of the employees, but that he thought too much of the employees to do that. It was also at this first meeting that Clower first notified the employees that there would be a layoff due to lack of work, but that the layoffs would go by seniority.[13]

At a second meeting with employees which Clower held that week in the employees' breakroom, the labor consultant was not present. At that meeting, Clower had a copy of a union contract from one of the Company's other branches, and read off the wage rates apparently contained in that contract.[14] At that meeting, Clower claimed that his hands were tied, and that, if the employees could "untie his hands," there would not be any layoffs and he could do something for the employees. Clower also stated that there would be no reprisals for any union activity if it were dropped or if his hands were untied.[15] Clower went on to explain that the only way his hands could become untied was for the employees to request their signed intent (authorization) cards back from the Union. Apparently, that subject was initiated by employee John Winebrenner, who asked during the meeting how employees could get their cards back.[16] Thereafter, Clower did, in fact, post on the employees' bulletin board a paper which instructed them with respect to the procedure for requesting their cards back from the Union.

Based on all the foregoing, I conclude, and therefore find, that on or about January 22 Respondent, through its agent, General Manager Clower, promised employees benefits and improvements in their working conditions if they would reject the Union. Such conduct constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

7. As previously noted, the NLRB election was held on February 15, 1980, commencing at 1 p.m. On the morning of the election, two female employees, Carmel Kight and Karen Ridge, who worked in the office of the Frostburg branch, were approached by Clower and secretary Sandy Ayers, respectively, with a request for them to: (1) vote in the election and (2) vote "No"—

[11] Based on the credited testimony of Durst, who impressed me as an honest and candid witness. Clower acknowledged that he had a conversation with Durst while they were driving to the awards banquet, but asserted that Durst volunteered the information that Ake had communicated with Durst concerning the Union and further asserted that Clower did not pursue the matter. In the light of Clower's extreme sensitivity to the employees' union activities, and his curiousity as to the leader or leaders of such movement, I find it incredible that Clower would not further interrogate Durst respecting the matter, particularly in the context of an automobile ride where there was no constriction upon such conversation.

[12] Based on the credited testimony of Durst; Crickinburger was not called as a witness although it was not shown that he was unavailable. In Respondent's brief (p. 4), it is contended that allegations involving Crickinburger should be dismissed because the timing of the amendments to the complaint did not give the Company adequate opportunity to have Crickinburger present. However, I stated at the outset of the hearing that, if Respondent needed additional time to respond, I would consider any such motion. No motion was ever made by Respondent to postpone the hearing or to hold it open for the purpose of adducing the testimony of Crickinburger.

[13] Based on the credited testimony of Michael and Richard Aldridge.

[14] Clower claimed that the union contract was produced at the request of two employees, Paul Brantner and William Phillips. However, these employees were not called as witnesses at the hearing.

[15] Clower admitted that he stated during these meetings that his hands were tied, but denied saying to the employees, that if they would "untie his hands," he would be able to do something for them. However, a secretary of Respondent at the Frostburg branch, who accompanied Clower to the meeting and was a witness the Respondent at the hearing, testified that she recalled Clower saying during the meeting, "[U]ntie my hands." Under all the circumstances, I credit the version of the witnesses for the General Counsel.

[16] Interestingly enough, Ake had, before his discharge, spoken with employee Winebrenner in an attempt to interest the latter in joining the Union. However, according to Ake's testimony, Winebrenner said that he was "dead set against the Union." Winebrenner did not testify at the hearing. Under such circumstances, a reasonable inference might be drawn that Winebrenner's initiation of this subject matter was prompted by someone other than Winebrenner.

against the Union. Prior to this occasion, neither Kight nor Ridge contemplated voting in the election, apparently because they considered themselves—and were considered by management—as being office clerical employees who were excluded from the appropriate unit.[17]

Kight testified that on the morning of the election Clower called her into his office, closed the door, and stated that he needed her to vote in the election, and asked her if she would vote "no" against the Union. She said that she would, and Clower replied that he thought that that was the way she would respond. He requested her not to mention anything about that conversation to any of the other employees or to Ridge. Kight was further advised by Clower that, if her vote was challenged, she was to say that she performed clerical work for the parts and service departments, and that if, she was asked if she was assigned to the office, to deny it. Subsequently, but before the election, Ayers came into Kight's office with a piece of paper which stated: "Clerical work for the parts and service department." Ayers advised that this language was what Kight was supposed to say if she was challenged, and that, if the Board agent asked if she was an office worker, she was to say "no," and repeat the language which was on the piece of paper.

Ridge testified that on the morning of the election Ayers came over to her and asked her if she would (1) vote in the election and (2) vote against the Union. Ridge responded affirmatively. Later, but before the election, Ayers came back to her and handed her a slip of paper which contained language which Ridge was supposed to state to the Board agent if she was asked the nature of her job. Ayers instructed Ridge to memorize the language on the paper and not to let anyone see it.[18]

Both Kight and Ridge attempted to vote in the election, but their votes were challenged by the Board agent because their names did not appear on the eligibility list. When the Board agent asked them the nature of their job duties, they responded with the language set forth on the pieces of paper which Ayers had given them, as aforesaid. However, Kight testified that she considered it inaccurate to deny that she was an office worker.

After the election, there was a meeting in Clower's office which was attended by Kight, Ridge, Ayers, and Hott. At that meeting, Clower stated that everything had gone well—that the matter was unresolved and could be tied up for a long period of time, possibly 2 years. He further advised Kight and Ridge respecting what their response should be if anyone from the NLRB attempted to contact them; i.e., that they should say that they would rather not talk to agents of the NLRB. Clower confirmed this instruction several months later to both Kight and Ridge—that, if they were contacted by agents of the NLRB, to say that they did not want to talk about the matter.

Based on all the foregoing, I find Clower's instruction to Kight respecting her vote in the election to constitute clear interference with employee rights in violation of Section 8(a)(1) of the Act. His further instruction to both Kight and Ridge respecting how they should respond to questions by agents of the NLRB and his direction to them not to cooperate in an investigation by the NLRB constituted substantial evidence of interference with Board processes in violation of Section 8(a)(1) of the Act.[19]

D. *The Alleged Discriminatory Layoffs of Michael Aldridge, John Palmer, and Michael Morris on January 25, 1980*

The above-named employees were terminated by Respondent on the stated date assertedly because of deteriorating economic conditions. The General Counsel and the Charging Party urge that they were terminated because of their activities on behalf of the Union, which Respondent opposed. A brief employment history of each employee is necessary in order to analyze and resolve the issue.

1. John Palmer

As previously noted, Palmer was originally employed by Respondent on October 2, 1979, as a bookkeeper. However, on December 6, 1979, he was transferred to perform mechanical-type work in the service department. On or about January 7, 1980, immediately after Ake was terminated, Clower transferred Palmer into the parts department where he worked as a parts clerk along with Morris, who trained him, and Hott, the parts department manager. During the month of January, Clower approached Palmer on two occasions in the parts department, and spoke with him respecting the union organizational drive which was extant in the facility at the time. Thus, on January 14 Clower said to Palmer:

> John, you know all this business about union talk going on, and I have every bit of authority in this department, in this company, as the general manager to sign a contract behind those guys' back, and I can do whatever I want or I can tie this thing up in court for two years. It doesn't matter to me. . . . I can do whatever I want because I'm the one running the show here and I'm the one that says whether or not we have a union.

About a week later, Clower again approached Palmer at the parts counter and said:

> You know, I can run this whole operation with just management through the Parts Department. . . . The Service Department is not where we get our business . . . in parts and we could survive off that

[17] The record reflects that on January 31, 1980, Clower wrote a letter to the Regional Director for Region 5 of the Board in which he listed five employees in the bargaining unit who would be eligible to vote in the February 15 election. Neither Kight nor Ridge were included on that list.

[18] According to Ridge's testimony, the language on the paper said that Ridge "did parts clerical work and worked for the parts department." Ridge testified that subsequently she threw the paper away.

[19] I further find Respondent responsible for the above-described conduct of Ayers on February 15, 1980, since it is a reasonable inference that her dispensing of the voting instructions and written responses to Ridge in the manner described was performed at the instigation and direction of Clower, and thus Ayers was constituted an agent of Respondent for that purpose at that time.

> alone. . . . I'll shut that whole thing down out there if it's necessary in order to keep a union out of here.[20]

On or about January 21, Clower asked Palmer if he would like to be trained as parts manager—Clower indicated that Charles Hott "doesn't really like his job and he is wanting to get into something else." Palmer responded that he would be interested if it did not create problems or friction.

On Friday, January 25, Palmer had worked a full day at the facility, and had gone home after work, when he was advised by Michael Clower, General Manager Clower's son, to return to the facility. He did so, and was told by General Manager Clower that he was being laid off because of problems which existed at one of Respondent's principal customers, Westvaco, which had resulted in a decline of Respondent's business. Palmer has not been recalled to work.

2. Michael Morris

Morris commenced employment with the Company on September 26, 1979, as a parts clerk. He worked with Ake, and was with Ake when the latter commenced his union activities, discussed *supra*. Morris signed a union card, and, after Ake was terminated, solicited four other employees (Micheal Aldridge, Richard Aldridge, Chuck Phillips, and one Miltenberger).

On Friday, January 25, at the end of the workday, Morris was called into Clower's office and told by the latter, "Well, Mike you have been doing a fine job, but I'm going to have to let you go due to the workload." At the time of the layoff, there were only two employees working as parts clerk—Palmer and Morris; both were laid off on January 25 without prior notice or warning.

3. Michael Aldridge

Michael Aldridge was employed by the Company on September 3, 1979, as a mechanic's helper in the service department. After Ake had contacted the union representative in December, Michael Aldridge discussed the matter with his brother, Richard Aldridge, and with Ake in and out of Respondent's Frostburg facility. Michael Aldridge also attended the union meeting on January 8.

On Friday, January 25, Michael Aldridge was called into Clower's office where he was told that he was being terminated or laid off for lack of work. Michael Aldridge testified that he had never been warned about the layoff prior to January 25, except that Clower had mentioned a layoff in one of the meetings held that week, but had not mentioned any names. Michael Aldridge also claimed that at the time of the layoff there was work for all of the employees in the shop.

[20] I find the foregoing statements of Clower to constitute interference, restraint, and coercion in violation of Sec. 8(a)(1) in that: (1) the first conversation clearly is intimidatory in that it inculcates in the employee a feeling of futility to engage in union activities; and (2) the second conversation, of course, constitutes a bald threat to eliminate a part of Respondent's operation and thereby deprive employees of their jobs in retaliation for engaging in protected activities.

4. Analysis and concluding findings

In the recent *Wright Line* case,[21] the Board set forth the following "causation test" which it indicated it would follow in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[22]

The first question to be raised and discussed is whether counsel for the General Counsel has sustained her burden of proving a *prima facie* case of discrimination. I am convinced, and therefore find, that she did.

Thus, the evidence shows that prior to January 25 Respondent was aware of—and strongly opposed to—the union activities of its employees. The evidence further shows that General Manager Clower—as a consequence of his investigative efforts—was specifically aware of the prounion proclivities of the three employees involved herein. Thus, Kight testified that on one occasion prior to Palmer's termination Clower came into the office where she was working just as Palmer was leaving. When Clower asked if Palmer had been talking to her about the Union, she said that he had not. Clower then remarked, responded, "Don't talk to him about the Union. He's no good. He's one of the bad guys. He's for the Union." Additionally, salesman Durst credibly testified that on one occasion Clower told Durst that Clower could not understand why Palmer, being a minister, would get involved in anything like the Union; and that on another occasion, Palmer, at a meeting, stated things that Clower had promised him on the job but afterwards failed to carry through. Clower stated to Durst, "Can you imagine anybody like that claiming to be a Christian and a minister and doing stuff like he's doing now?" Clower also mentioned to Durst that he "felt that the Aldridge boys, Mike and Rick Aldridge, were involved with the Union too, that he felt that they were part of the ringleaders to get the Union involved in the branch."[23]

The timing of the termination of these employees, so shortly after Respondent became aware of their union activities (and shortly prior to the upcoming union election) reflects a discriminatory intent which is sufficient to shift the burden to Respondent to explain that the terminations would have taken place even in the absence of the union activities. I am of the view that the Respondent has not sustained its burden on that issue in this case.

In the first place, although Clower advised the employees at their exit interviews that they were being laid off because of a lack of work, Clower testified at the hearing that Morris and Michael Aldridge were "termi-

[21] *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).
[22] *Id.* at 1089.
[23] Based on the credited testimony of Durst.

nated," as distinguished from Richard Aldridge, who was "furloughed"; i.e., laid off. If, in fact, Clower's intent was merely to shorten his payroll during the economic downturn, there was no reason to "terminate" the employees.[24]

Secondly, the layoff was inconsistent with Respondent's past practice during times of economic slowdown. The record is clear that during such times, it was the practice of Respondent, prior to 1980, to either shorten hours or engage in certain "make work" activities, such as repairing and refurbishing Respondent's own equipment (which it rented to customers), rather than to lay off employees. Indeed, as the evidence shows, Respondent subsequently did exactly that; i.e., reduced the hours of Kight and Ridge (whom it knew not to be union supporters) during the spring of 1980.

Thirdly, and perhaps more importantly, Respondent's evidence does not show that the economic downturn which it feared—and which eventually occurred—had arrived sufficiently to warrant the summary layoff of the three individuals involved as early as January 25. While it is recognized, of course, that the Board was not established to second guess an employer on his business or management decisions, the evidence in this case simply does not sustain Respondent's contention that its business activities had so greatly diminished by the end of January as to warrant the layoff of the individuals involved. Thus, all of the individuals testified that they were busy on their jobs, and not loafing, at the time they were terminated. This testimony is confirmed by statistical evidence in the record that the hours per man per week worked during January 1980 compared favorably to the same figure in January 1979.[25] Similarly, the record shows that the service department's billings during January 1980 were higher than those of either the months of September, October, or November 1979.[26] Finally, with respect to the parts department where Palmer and Morris worked (they were the only two parts clerks working in the parts department at the time of the termination), the record shows that the monthly sales of that department for January 1980, were higher than those for 6 months of the previous year when no layoffs occurred.

Clower testified that the decision to lay off the three employees was reached on or about January 2, 1980, after he and the service manager, Norval Wood, "reviewed the workload and we got a stop order on a . . . major job we were performing for one of our customers [Westvaco]." If such be the fact, and the decision was actually made around the first of January, one may ponder why the employees involved were not notified of their impending layoff until the day of the layoff, if another reason was not involved. As the United States Court of Appeals for the District of Columbia observed in a somewhat similar situation: "Such action on the part of an employer is not natural."[27] This is particularly true in this case where, as the undisputed evidence shows, during the month of January Clower promised both Morris and Michael Aldridge a raise to be paid in February. Needless to say, neither of them received the raise due to the fact that they were terminated.

Based on all of the foregoing, I conclude, and therefore find, that Respondent did not sustain its burden of showing that the termination of the three employees on January 25 would have occurred had it not been for their union activities. Accordingly, I find that their terminations on January 25, 1980, were in order to discourage membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

E. *The Layoff of Richard Aldridge*

Richard Aldridge was first employed by Respondent on April 25, 1978, to train as a parts clerk. After the first 6 months of employment, he was transferred to the service department to train as a mechanic's helper. However, after his brother, Michael Aldridge, was terminated on January 25, 1980, as aforesaid, Richard Aldridge was transferred back to the parts department and, indeed, was the only parts clerk in that department until he was laid off on February 28, 1980.

Richard Aldridge first learned about the union campaign from Ake around the first of January 1980. He thereafter discussed the subject with other employees and attended the union meeting on January 8 where he signed a card of intent. He was selected as the Union's observer at the NLRB election on February 15.

Richard Aldridge was laid off by Clower at the end of the workday on February 28. Clover told Richard Aldridge that the reason for the layoff was due to a lack of work, and said it was a temporary layoff. However, up to the time of the hearing in this case, Richard Aldridge had not been recalled to work by Respondent.

Richard Aldridge testified that during the last month of his employment when he was working in the parts department, he was kept "pretty busy"; that he was the only employee working there except for, occasionally, Michael Clower; that Kight and Ridge helped him clean out the parts bin; and that, indeed, on the day of his layoff he was working on a big order from a customer consisting of 5 pages of approximately 50 to 60 items, some of which he had not even located when he was called into Clower's office for the exit interview.

Analysis and Concluding Findings

Respondent's contentions with respect to the layoff of Richard Aldridge are substantially similar to those proffered with regard to the three employees terminated on January 25; i.e., it was a result of the economic downturn in Respondent's business. For the reasons set forth below, I am satisfied that Respondent did not sustain its burden of showing that Richard Aldridge would have been laid off at the time indicated in the absence of his engaging in protected activities.

Thus, as in the case of the other alleged discriminatees, there can be no doubt of Richard Aldridge's prominence in the union campaign and of Respondent's hostility to it. The last evidence of such conduct which, of course,

[24] Respondent does not contend that either of the employees was not adequately performing his job.

[25] Those hours were 46.95 in January 1980 and 46.2 in January 1979. See G.C. Exh. 4.

[26] G.C. Exh. 5.

[27] *E. Anthony & Sons, Inc.* v. *N.L.R.B.*, 163 F.2d 22, 26, 27 (1947), cert. denied 332 U.S. 773.

came to the Respondent's attention was Aldridge's participation as union observer at the NLRB election. Less than 2 weeks later, he was laid off. At the time he was the only employee working full time in the parts department, and he was working on a large order for a customer. The statistical evidence (G.C. Exh. 6) shows that sales for the month of February 1980, exceeded those for any other month in the history of the Frostburg branch. Such evidence certainly casts serious doubt upon the veracity of Respondent's argument that work had fallen off to the extent that a layoff was required.

Moreover, one may ponder whether, if another consideration was not involved, Clower would not have utilized the procedure used prior to the union campaign (and subsequently with respect to acknowledged nonunion employees Kight and Ridge) of paring the number of hours per week worked among existing employees rather than laying them off. In this connection, it should be noted that there was no direction from Respondent's headquarters to Clower that laying off employees was only one of the alternatives which Clower possessed in determining how to cope with the impending decline in the economic situation. Thus, Mitchell, who was Clower's immediate supervisor at the Company's headquarters in Bluefield, testified that, with respect to the ratio of employees to the workload which Clower had, the latter could do one of two things—either cut manpower by cutting the workweek or reduce the manpower level—and that it was Clower's decision. Mitchell further testified that he did not participate in Clower's decision to lay off the people—i.e., that he first learned of the decision when the termination notices came across his desk.

Accordingly, it is my view, and I therefore find, that Clower's decision to lay off Richard Aldridge was a deviation from prior practice based on Clower's abhorence of the Union, and therefore constituted discrimination to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

II. THE CHALLENGED BALLOTS

As previously noted, the outcome of the NLRB election held on February 15, 1980, was not determined because of a relatively large number (nine) of challenged ballots. The Regional Director reported that the Board agent conducting the election challenged the ballots of the following voters because their names did not appear on the eligibility list: "David S. Ake, Michael R. Aldridge, John F. Palmer, Jr., Michael R. Morris, Carmel Kight, Maxine C. Clower, Michael W. Clower, Charles Hott, Karen Ridge."

The Regional Director further ordered that the representation matter be consolidated with the instant complaint cases for the purpose of a hearing, ruling, and decision by an administrative law judge with respect to the challenges to the ballots of the above-named individuals.

With respect to the ballots of Ake, Michael Aldridge, Palmer, and Morris, it has been determined above that these individuals were discriminatorily terminated prior to the election. Had not such discrimination occurred, the employees would have been within the unit and therefore eligible to vote in the election. Accordingly, I find and conclude that the challenges to their ballots should be overruled, and that their ballots should be opened and counted.

We now proceed to a consideration of the evidence adduced with respect to the remaining five individuals whose ballots were challenged at the election.[28]

1. Maxine Clower

Maxine Clower is the wife of General Manager Kermit Clower. The record evidence respecting her duties and functions as an employee of Respondent employer is scanty since she was not called as a witness by any party to the proceeding. It does appear, however, that she worked on a part-time basis for Respondent performing, primarily, bookkeeping and clerical services in the office of the Company. No records respecting her time or work performance were introduced into evidence, but it was estimated that she worked approximately 4 or 5 hours per week primarily on Saturday mornings. Other evidence showed that, when she was present at the facility during lunchtime, she customarily ate with the office clerical employees in their breakroom as distinguished from the parts and service employees who ate in their own breakroom. It is a reasonable inference from the evidence adduced that her community of interest was with that of the office clerical employees; accordingly, she would be excluded from the appropriate unit, and, therefore, the challenge to her ballot should be sustained.[29]

2. Michael Clower

Michael Clower is the son of General Manager Kermit Clower, and worked as a "parts traveler" with the Company; that is to say, Michael was furnished a company-owned vehicle from which he sold and distributed parts to customers outside Respondent's facility. Thus, Michael Clower spent a large percentage of his time away from the Frostburg plant,[30] and, unlike the other parts department employees who were paid on an hourly basis, Michael Clower was salaried and commissioned.[31] Additionally, the record reflects that, while regular parts department employees who worked at the facility wore uniforms, Michael Clower customarily wore a suit coat and tie.

On the basis of all the foregoing, I find that the duties and functions of Michael Clower were such as to separate him from a community of interest with other unit employees, and therefore his status was outside that of the bargaining unit employees. Accordingly, the challenge to his ballot should be sustained.

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[28] The Regional Director reported that Respondent took no position and submitted no evidence with respect to a resolution of the challenged ballots.

[29] In view of this finding, I do not reach the Union's additional argument that Maxine Clower should be excluded from the unit because of her familiar relationship with Kermit Clower.

[30] Michael Clower did not testify, nor were records of his worktime or performance introduced into evidence.

[31] Based on the uncontradicted testimony of Michael Morris.

3. Charles Hott

It is the Union's position that the challenge to the ballot of Charles Hott should be sustained on the grounds that he was a supervisor as defined in the Act, and therefore excluded from the appropriate unit. Kermit Clower testified that in November 1979 Hott was the manager of the parts department, but that as of the first of the year he was reclassified as the leadman in the parts department and that such change in classification came about because of a decrease in the workload and the necessity of Respondent to terminate and furlough employees in the parts department. Interestingly, however, there is no evidence of notification to the employees of such change in the status, duties, or responsibilities of Hott.[32] The evidence reflects that prior to the election the supervisory hierarchy at the Frostburg facility was as follows: Kermit Clower was general manager and in charge of the facility. In addition, he was apparently direct supervisor over the office clerical and sales personnel. Wood was manager of the service department and Hott was manager of the parts department. I note that Ake referred to Hott as his "immediate supervisor," and, as previously related, received from Hott clearance respecting the 1980 vacation period. The same may be said respecting the testimony of Morris, also setforth above. Morris also testified that Hott regularly attended management meetings on Mondays, and assigned work to employees in the parts department.

On the basis of all the foregoing, I am of the view, and therefore find, that there is substantial evidence to sustain the contention that, at all times material herein, Hott was a supervisor within the meaning of the Act, and therefore not eligible to vote as a member of the bargaining unit.[33] I shall therefore recommend that the challenge to the ballot of Charles Hott be sustained.

4. Carmel Kight and Karen Ridge

Both of the above-named employees worked at desks which were located in the main office of Respondent's Frostburg facility. Kight was employed by Respondent in October 1978 as a receptionist/secretary. Her duties included answering the telephone, operating the two-way radio and teletype machine, and receiving visitors. About a year later, she was promoted to parts and service secretary. She testified that, as such she handled all of the parts and service sales sheets, and ran the billing each day. However, her work location remained in the main office, which was separated from the service and parts departments, and she remained directly responsible to Kermit Clower as her direct supervisor. Moreover, she testified that at mealtimes she ate lunch in the breakroom of the office employees (Ayers, Maxine Clower, and Ridge), which she distinguished from the breakroom in the parts department where the parts and service employees ate.

Karen Ridge was employed by the Company in October 1979, as a secretary/receptionist. Her job duties were to answer the telephone, greet visitors, operate the teletype machine, and perform filing and typing operations when called upon to do so. She testified that, if Kermit Clower's secretary, Ayers, was not present at weekly personnel meetings, she would take shorthand notes and later transcribe them. While it appears that Ridge spent a substantial amount of time using the teletype machine to order parts for the parts department, the fact remains that the teletype machine was located in the main office, and that she spent a majority of her time in the performance of duties at that location. As in the case of Kight, Ridge testified that at lunchtime she "went to the lunchroom in the office" and ate with the "office people," and that the parts and service clerks had a lunchroom in the shop where they had their lunch.

Based on all of the foregoing factors, I conclude, and therefore find, that Carmel Kight and Karen Ridge were, at all times material herein, "office" clerical employees as distinguished from "plant" clerical employees[34] and therefore excluded from the unit. The challenges to their ballots should therefore be sustained.[35]

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with its interstate operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take the following affirmative action which is necessary to effectuate the policies of the Act.

Having found that Respondent discriminatorily terminated David S. Ake, Michael R. Morris, Michael R. Aldridge, John F. Palmer, Jr., and Richard Aldridge, I shall recommend that Respondent offer said employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantiallly equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716

[32] Hott was not called as a witness by any party to the proceeding.

[33] It is noted that, in a prior proceeding involving this Respondent at another of its plants, the Board found that the parts manager at that plant was a supervisor within the meaning of the Act; this finding was sustained by the United States Court of Appeals for the Fourth Circuit. See *N.L.R.B.* v. *Rish Equipment Company*, 359 F.2d 391 (1966).

[34] See, e.g., *N.L.R.B.* v. *Big Threee Industries, Inc.*, 602 F.2d 898 (9th Cir. 1979).

[35] It seems noteworthy that, at least up to the day of the election, Respondent, too, considered Kight and Ridge to be outside the scope of the unit since it did not include either among its list of eligible employees which it submitted to the Regional Director on January 31, 1980. The same observation may, of course, be made with respect to Maxine Clower, Michael Clower, and Hott.

(1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As the unfair labor practices committed by Respondent strike at the very heart of employee rights safeguarded by the Act, I shall recommend that Respondent be placed under a broad order to cease and desist from in any manner infringing upon the rights of employees guaranteed in Section 7 of the Act.[36]

Upon the basis of the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, in the manner above described, Respondent has violated Section 8(a)(1) of the Act.

4. By discriminatorily terminating employees David S. Ake, John F. Palmer, Michael R. Morris, Michael Aldridge, and Richard Aldridge in order to discourage membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[37]

The Respondent, Rish Equipment Company, Inc., Frostburg, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union of Operating Engineers, Local No. 37, AFL-CIO, or any other labor organization, by discharging, terminating, or otherwise discriminating against employees because of their union membership or activities.

(b) Coercively interrogating employees concerning their union membership or activities or such activities on the part of other employees.

(c) Creating an impression of surveillance of employees' union activities.

(d) Threatening employees with discharge and other recriminations for engaging in union activities.

(e) Promising employees benefits and improvements in their working conditions if the employees would reject the Union and cease engaging in activities on its behalf.

(f) Instructing employees how to vote in an NLRB election.

(g) Instructing employees not to cooperate in investigations by agents of the National Labor Relations Board.

(h) Threatening employees with shutting down its Frostburg operations if it were necessary in order to keep the employees from being represented by a labor organization.

(i) Threatening employees with extended litigation in order to discourage their membership in and activities on behalf of a labor organization.

(j) Expressing to employees the futility of their selecting the Union as their collective-bargaining representative.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer David S. Ake, Michael R. Morris, Michael Aldridge, Richard Aldridge, and John F. Palmer, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Frostburg, Maryland, facility copies of the notice attached marked "Appendix."[38] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respndent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that Case 5-RC-11086 be remanded to the Regional Director for Region 5 to open and count the challenged ballots in accordance

[36] *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[37] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[38] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

with the findings made in section II of this Decision, to issue a revised tally of ballots, and to take such further action as then becomes appropriate.

IT IS FURTHER RECOMMENDED that the complaints be, and they hereby are, dismissed insofar as they allege violations of the Act not found in this Decision.